FILED
JUN 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

GEORGE PUCHERT,
Appellee.

On Appeal From The Supreme Court of Hawaii

MOTION TO DISMISS OR AFFIRM

JAN T. CHILTON
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
Telephone: (415) 398-3344
Attorney for Appellee
George Puchert

Of Counsel:
KURT W. MELCHIOR
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
Telephone: (415) 398-3344

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

35pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Hawaii Revised Statutes Section 378-32 prohibits employers from suspending or discharging employees "solely because the employee has suffered a work injury" compensable under Hawaii's workers' compensation law. May Hawaii enforce this law against an air carrier despite a claim that it is preempted by the Railway Labor Act (45 U.S.C. § 151 et seq.)?

2. Hawaii Revised Statutes Sections 378-33—378-37 provide an administrative remedy before the Hawaii Department of Labor and Industrial Relations for employees who have been suspended or discharged in violation of section 378-32. May an employee who is covered by the Railway Labor Act invoke this state administrative remedy to enforce his rights under state law without exhausting his arbitral remedies under the Railway Labor Act (45 U.S.C. §§ 153, 184)?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Summary of Argument	1
Argument	4
1. The Railway Labor Act Does Not Preempt Hawaii Revised Statutes Section 378-32	4
a. The RLA Does Not Protect or Prohibit Discriminatory Discharges	4
b. Protecting Injured Workers Is A Matter Overriding State Concern	6
c. There Is No Risk Of Substantial Interference With RLA Administration	7
2. Puchert Was Not Required to Exhaust Arbitral Remedies	10
Conclusion	17
Supplementary Appendix	A-1

TABLE OF AUTHORITIES

Cases

Page

Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C.Cir. 1980) 13

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 11, 13, 14, 15, 16

Andrews v. Louisville & N. R.R., 406 U.S. 320 (1972) 3, 11-12, 14

Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) 11, 13, 15, 16

Beers v. Southern Pac. Transp. Co., 703 F.2d 425 (9th Cir. 1983) 4

Choate v. Louisville & N. R.R., 715 F.2d 369 (7th Cir. 1983) 4

Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) 2, 3, 5

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) 2, 4, 5, 8, 9

Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1979) 7

Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) 8, 14

Harris v. Norfolk & W. R., 616 F.2d 377 (8th Cir. 1969) 13

Hunter v. Atchison, T. & S. F. R.R., 171 F.2d 594 (7th Cir. 1948), cert. den., 337 U.S. 916 (1949) 9

International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) 8

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), cert. den., ... U.S. ....., 104 S.Ct. 1000 (1984) 4-5

Table of Authorities

Cases

Page

Johnson v. American Airlines, Inc., 487 F.Supp. 1343 (N.D.Tex. 1980) 13

Kidder v. Eastern Air Lines, Inc., 469 F.Supp. 1060 (S.D.Fla. 1978) 12, 14

McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265 (1958) 3, 13

Messenger v. Volkswagen of America, Inc., ... F.Supp. ....., No. 82-2601 (S.D.W.Va. May 18, 1984) 3, 7, 15

Moe v. Eastern Air Lines, Inc., 246 F.2d 215 (5th Cir. 1957), cert. den., 357 U.S. 936 (1958) 13

New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) 8

Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969) 13

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 2, 3, 6, 7, 8, 14, 15

Republic Steel Corp. v. Maddox, 379 U.S. 652 (1965) .. 14

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) 4, 8, 9

United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 597 (1960) 9

United Steelworkers v. Union R., 648 F.2d 905 (3d Cir. 1981) 9

Vaughn v. Pacific Northwest Bell Telephone Co., 289 Or. 73, 611 P.2d 281 (1980) 3, 7

Table of Authorities

Statutes

Page

Federal:

Civil Rights Act of 1964, Title VII 10

National Labor Relations Act 3, 4, 13, 14

Railway Labor Act .....passim

United States Code:

Title 33:

Section 901 6

Section 948a 7

Title 45:

Section 51 6

Section 151a 8

Section 152 5

Section 153 ..... 2, 8

Section 184 ..... 2, 8

Title 46:

Section 688 6

State:

Hawaii Revised Statutes:

Section 378-32 .....passim

Other Authorities

Larson's Workmen's Compensation Law (1982):

Vol. 1, §§ 5.20, 5.30 6

Vol. 2A, § 68.36(a) 6, 7

No. 83-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

GEORGE PUCHERT,
Appellee.

On Appeal From The Supreme Court of Hawaii

MOTION TO DISMISS OR AFFIRM

SUMMARY OF ARGUMENT

Appellee George Puchert was a port steward for appellant Pan American World Airways, Inc. (Pan Am). He was injured on the job and received compensation under Haiwaii's workers' compensation law. Pan Am fired him because of his injury.

Puchert filed a claim in the Hawaii Department of Labor and Industrial Relations to enforce his state law right not to be discharged because of work injuries. His claim arises entirely from this state law which is basic to Hawaii's workers' compensation scheme.

Rejecting arguments Pan Am raised for the first time in that court, the Hawaii Supreme Court correctly determined that Hawaii's law was not preempted by the Railway Labor Act (RLA). It also properly held that Puchert

need not exhaust arbitral remedies under the RLA before proceeding to enforce his state law rights in the Hawaii Department of Labor and Industrial Relations.

Federal labor laws do not preempt all state regulation of the employer-employee relationship. A state law affecting that relationship will not be preempted if (1) it does not regulate conduct even arguably protected or prohibited by federal labor law, (2) it addresses a matter of overriding state interest, and (3) it poses no substantial risk of interference with effective administration of national labor policy. *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 298 (1977).

Hawaii's statute forbidding discrimination against injured workers meets these criteria. The RLA does not protect or prohibit discrimination in employment. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.,* 372 U.S. 714, 724 (1963). "Workmen's compensation is preeminently a matter of state concern." *Peabody Galion v. Dollar,* 666 F.2d 1309, 1317 (10th Cir. 1981). Hawaii's statute leaves employers generally free to deal with their employees as they choose; it prohibits only "the exercise of an underhanded means of firing employees who have elected to utilize workmen's compensation." *Id.* at 1317. The RLA does not preempt Hawaii Revised Statutes Section 378-32.

Puchert's claim that Pan Am fired him in violation of section 378-32 is not a "minor dispute" which must be arbitrated under the RLA. The RLA's mandatory arbitration provisions (45 U.S.C. §§ 153, 184) apply only to claims based upon rights arising from collective bargaining agree-

ments. *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 324 (1972). An employee is not required to arbitrate a claim based on a statutory right. This is true whether the claim arises under state or federal law. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., supra; McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 268-269 (1958).

These preemption and exhaustion of arbitral remedies principles are no different under the RLA than under the National Labor Relations Act (NLRA). Three recent decisions have held that the NLRA does not preempt state statutes like Hawaii Revised Statute Section 378-32 and that workers fired in violation of such statutes may pursue state remedies against such violations without exhausting arbitral remedies. *Peabody Galion v. Dollar, supra,* 666 F.2d 1309; *Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 611 P.2d 281 (1980); *Messenger v. Volkswagen of America, Inc.*, ... F.Supp. ....., No. 82-2601 (S.D. W.Va. May 18, 1984).

Those decisions and the Hawaii Supreme Court's ruling in this case correctly apply well-established rules of federal labor law. Congress did not intend the NLRA or the RLA to prevent states from protecting workers against being fired because they were injured on the job. The Hawaii Supreme Court's decision is a correct application of established law. It raises no substantial federal question warranting this Court's review. The appeal should be dismissed, or the Hawaii Supreme Court's judgment should be affirmed.

ARGUMENT

1. The Railway Labor Act Does Not Preempt Hawaii Revised Statutes Section 378-32

In determining whether federal labor laws preempt state law, this Court applies a flexible test which depends "upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of allowing the state law to be enforced. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 188-189 (1978).

State laws are not preempted if (1) they do not regulate conduct which is arguably or in fact protected or prohibited by federal labor laws, (2) they address a matter of "overriding state interest" which is "deeply rooted in local feeling and responsibility," and (3) there is little risk that they will interfere with the effective administration of national labor policy. *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 298.

Contrary to Pan Am's unsupported argument, Juris. Statement, 37-38, 40, this same test applies to preemption by the RLA as well as to preemption by the NLRA. *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045, 1052 & n. 9 (7th Cir. 1983), cert. den., ... U.S. ....., 104 S.Ct. 1000 (1984); *Choate v. Louisville & N. R.R.,* 715 F.2d 369, 371 (7th Cir. 1983); *Beers v. Southern Pac. Transp. Co.,* 703 F.2d 425, 428-429 (9th Cir. 1983). As the Seventh Circuit recently put it:

> The *Colorado Anti-Discrimination* [*Comm'n v. Continental Air Lines, Inc.,* 374 U.S. 714, 724] case illustrates a mode of analysis consistent with *Farmer* and *Sears* and demonstrates that not every state dispute

> involving a carrier subject to the RLA is preempted by that statute.

Jackson v. Consolidated Rail Corp., supra, 717 F.2d at 1052 n. 9.

As will be shown below, Hawaii Revised Statutes Section 378-32 meets the three *Farmer* criteria. Therefore, the Hawaii Supreme Court correctly concluded it was not preempted by the RLA.

a. The RLA Does Not Protect or Prohibit Discriminatory Discharges

Hawaii Revised Statute Section 378-32 prohibits employers from suspending or discharging an employee "[s]olely because the employee has suffered a work injury." App. 22. The RLA does not even arguably protect or prohibit such discriminatory suspensions or discharges.

As this Court held in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., supra,* 372 U.S. at 724:

> No provision in the [RLA] even mentions discrimination in hiring. . . . Nothing in the Railway Labor Act or in our cases suggests that the Act places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for that purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act.

Fn. omitted.

The *Colorado Anti-Discrimination* case dealt with racial discrimination, but its holding applies here. Section 2 of the RLA (45 U.S.C. § 152), the only section of the RLA which protects or prohibits employer or employee conduct,

says nothing about discrimination against injured workers, just as it says nothing about racial discrimination. Neither form of discrimination is even arguably protected or prohibited by the RLA.

b. Protecting Injured Workers Is A Matter Of Overriding State Concern

With a few specific exceptions governed by federal law, e.g., 33 U.S.C. § 901 et seq.; 45 U.S.C. § 51 et seq.; 46 U.S.C. § 688, compensation for injured workers has long been a matter of state regulation and concern. Every state has a worker's compensation law. 1 Larson's Workmen's Compensation Law, §§ 5.20, 5.30, pp. 37-39 (1982). Most of those laws have been in effect for more than 50 years. *Ibid.* As the Tenth Circuit has said, "[w]orkmen's compensation is preeminently a matter of state concern." *Peabody Galion v. Dollar, supra,* 666 F.2d at 1317.

Hawaii Revised Statutes Section 378-32 partakes fully of this local concern. It prohibits specific acts of discrimination against injured workers in order to prevent employers from circumventing Hawaii's worker's compensation act and in order to ensure that workers are not deterred from seeking benefits under that act.

> If . . . an employer could with impunity coerce an employee into forgoing his rights, the employer could unilaterally defy and destroy the function of the [worker's compensation] act, and at the same time relieve himself of an obligation deliberately imposed on him by the legislature.

2A Larson's Workmen's Compensation Law, § 68.36(a), p. 13-94 (1982).

Recognizing this fact, most other states have adopted statutes or rules of law similar to Hawaii's Section 378-32. *Id.* at pp. 13-85—13-92. Congress, too, has seen the need for such a rule in connection with the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 948a. Interestingly, the first case on point was recent. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1979). As Larson comments:

> It is odd that such a decision was so long in coming. Perhaps the explanation may be in the fact that the conduct involved is so contemptible that few modern employers would be willing to risk the opprobrium of being found in such a position.

2A Larson's Workmen's Compensation Law, § 68.36(a), p. 13-93 (1982).

As the Oregon Supreme Court has held, statutes like Hawaii Revised Statutes Section 378-32 are matters of particular state concern and responsibility. They are necessary to vindicate the state's "substantial interest in protecting the integrity of its workers' compensation system." *Vaughn v. Pacific Northwest Bell Telephone Co., supra,* 611 P.2d at 287.

c. There Is No Risk Of Substantial Interference With RLA Administration

The only courts which have considered the question have concluded that statutes like Section 378-32 do not pose a substantial risk of interfering with the effective administration of the NLRA. *Peabody Galion v. Dollar, supra,* 666 F.2d at 1317; *Vaughn v. Pacific Northwest Bell Telephone Co., supra,* 611 P.2d at 287; *Messenger v. Volkswagen of America, Inc., supra,* ..... F.Supp. at ..... The RLA's special features do not require a different result.

Section 378-32 is a general regulation, not a law designed to regulate labor relations. It is therefore "less likely to generate rules or remedies which conflict with federal labor policy than the invocation of a special remedy under a state labor relations law." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, supra,* 436 U.S. at 197 n. 27.

Section 378-32 guarantees rights to individual workers. It "has nothing whatsoever to do with" union organization or collective bargaining, *Peabody Galion v. Dollar, supra,* 666 F.2d at 1316, which are the primary concerns of the RLA, *International Ass'n of Machinists v. Street,* 367 U.S. 740, 759 (1961); 45 U.S.C. § 151a. Discrimination against individual injured workers is not one of the "means of economic warfare [that Congress intended to leave free] for use during the bargaining process." *New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519, 530 (1979).

Hawaii's statute does not tell employers whom to hire, retain or fire. It merely proscribes one motive or reason for suspending or firing an employee. Like the tort discussed in *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 305, Section 378-32 prohibits an employer from firing workers in a particular manner or for a particular motive. It does not prohibit discharges as such. See *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367, 1374 (9th Cir. 1984).

Hawaii's statute poses no substantial risk of interference with the RLA's system of mandatory arbitration for "minor disputes." 45 U.S.C., §§ 153, 184. That arbitration system is designed to handle claims arising from alleged

breaches of collective bargaining agreements, not violations of state law. See pp. 10-16, below. An RLA board of adjustment "may of course look for guidance from many sources, yet [its] award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960); *United Steelworkers v. Union R.*, 648 F.2d 905, 911 (3d Cir. 1981); *Hunter v. Atchison, T. & S. F. R.R.*, 171 F.2d 594, 598-599 (7th Cir. 1948), cert. den., 337 U.S. 916 (1949). Boards of adjustment do not enforce state workers' compensation laws.

By contrast, in a state administrative proceeding to enforce Section 378-32, the sole question will be whether an employer violated that state law by suspending or firing a worker because of his work injury. This different focus of the state administrative proceeding assures that it will not interfere with RLA arbitration. See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, supra,* 436 U.S. at 197; *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 304.

Pan Am's collective bargaining agreement with Puchert's union recognizes these principles. The agreement contains no provision regarding discrimination against injured employees, requiring only that Pan Am have "just and sufficient" cause for termination. App. 76. The agreement limits Pan Am-union boards of adjustment to determining *only* those disputes "growing out of grievances involving interpretation or application of [the collective bargaining] Agreements." App. 78; Supp. App. 7. The boards of adjustment would, therefore, be unable to hear Puchert's claim of discrimination in violation of Section 378-32.

Most significantly, Pan Am and Puchert's union have already agreed that state law shall supersede their agreement. Article 15(a) of the agreement states:

> Provisions of this Agreement will apply only to the extent that they do not conflict with local laws of any country, state, territory or possession.

Supp. App. 5. Given this provision, it is hardly surprising that Pan Am has never suggested how Puchert's pursuing his state administrative remedy will interfere in any concrete way with RLA arbitration under the Pan Am-union contract.

There is no substantial danger of such interference. Hawaii's statute addresses a matter of overriding state concern. It is necessary to protect the integrity of Hawaii's worker's compensation law. The statute does not regulate conduct even arguably protected or prohibited by the RLA. The Hawaii Supeme Court correctly concluded that Section 378-32 is not preempted.

2. Puchert Was Not Required To Exhaust Arbitral Remedies

Puchert was not required to pursue arbitration under the RLA before proceeding in the Hawaii Department of Labor and Industrial Relations on his claim that Pan Am had fired him in violation of Section 378-32. The RLA's mandatory system of arbitration for "minor disputes" applies only to claims based on rights arising from a collective bargaining agreement. That arbitration system was not designed to, and does not, handle claims based on state statutory rights.

This Court held in *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 737 (1981) that:

> While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

This Court made the same distinction in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974), in holding that an employee could sue under Title VII of the Civil Rights Act of 1964 even though he had earlier lost an arbitration arising from the same incident:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Pan Am fails to note this crucial distinction and consequently argues that this case is governed by *Andrews v. Louisville & N. R.R., supra,* 406 U.S. 320. Juris. Statement, 17-22. *Andrews,* however, is inapposite. Andrews' wrongful discharge suit sought to vindicate rights arising from a collective bargaining agreement, not from a state or federal law. As this Court observed:

> Here it is conceded by all that the only source of plaintiff's right not to be discharged . . . is the collective bargaining agreement between the employer and the

> union. . . . The fact that petitioner intends hereafter to seek employment elsewhere does not make his present claim against his employer any less a dispute as to the interpretation of a collective-bargaining agreement. His claim is therefore subject to the [RLA's] requirement that it be submitted to the Board for adjustment.

406 U.S. at 324.

Puchert's claim, by contrast, arises under Hawaii statutes, not Pan Am's collective bargaining agreement. The Hawaii Supreme Court correctly found that:

> Puchert complains of a violation of his right not to be discharged from his employment solely because he suffered from a work related injury compensable under the state's worker's compensation law. This right finds its source not in the collective bargaining agreement between Pan Am and Puchert's union, but in the statute. [Citation.]

App. 7; contra, Juris. Statement, 22.

Since Puchert's right not to be discharged arises from Hawaii Revised Statutes Section 378-32, not the collective bargaining agreement, *Andrews'* holding and reasoning are inapplicable to this case. *Kidder v. Eastern Air Lines, Inc.*, 469 F.Supp. 1060, 1063 (S.D.Fla. 1978).[1]

---

[1]Hawaii Revised Statutes Section 378-32 guarantees injured workers the right to be free from retaliatory discharges regardless of any agreement the workers or their union may have with the employer. Consequently, the statute does not merely "call a minor dispute by another name" as Pan Am suggests. Juris. Statement, 43. For the same reason, the decisions Pan Am cites at pages 20-22 of its Jurisdiction Statement are inapposite. In each of them, the employee tried to plead a state contract or tort claim, but his rights in each case flowed from the collective bargaining agreement, not some independent source such as section 378-32.

Pan Am also argues that the distinction noted in *Barrentine* and *Alexander* between contract and statutory rights applies only to arbitration under the NLRA, not arbitration under the RLA. Juris. Statement, 34-40. Pan Am is wrong. In *McKinney v. Missouri-Kansas-Texas R.R., supra,* 357 U.S. at 268-269, this Court made the same distinction in an RLA case, stating:

> The Court of Appeals correctly held that petitioner was not obliged, before bringing suit in the District Court under § 9(d) of the [Universal Military Training and Service] Act [citation], to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board. [Citation.] The rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement. . . . Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.

Numerous lower courts have also held that employees asserting statutory claims need not proceed to arbitration under the RLA. *Air Line Pilots Ass'n v. Northwest Airlines, Inc.,* 627 F.2d 272, 277-278 (D.C.Cir. 1980) (ERISA claims not requiring interpretation of the collective bargaining agreement); *Harris v. Norfolk & W. R.,* 616 F.2d 377, 379 (8th Cir. 1969) (Title VII claims); *Norman v. Missouri Pac. R.R.,* 414 F.2d 73, 79-83 (8th Cir. 1969) (Title VII claims); *Moe v. Eastern Air Lines, Inc.,* 246 F.2d 215, 218 (5th Cir. 1957), cert. den., 357 U.S. 936 (1958) (Veteran's reemployment rights claim); *Johnson v. American Airlines, Inc.,* 487 F.Supp. 1343 (N.D.Tex.

1980) (ADEA claims); *Kidder v. Eastern Air Lines, Inc., supra,* 469 F.Supp. at 1062-1065 (Veteran's reemployment rights claims). There is no reason to treat RLA arbitration any different from NLRA arbitration on this point. Once an employer and union have agreed to arbitration under the NLRA, an employee is just as firmly required to pursue arbitration under that act as he is under the RLA. See *Andrews v. Louisville & N. R.R., supra,* 406 U.S. at 323; *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652 (1965).

Finally, Pan Am is wrong in contending that the employee may not pursue a non-arbitration remedy if his claim is based on a state statute rather than a federal one. Juris. Statement, 34-39. Both the Ninth and Tenth Circuits have recently rejected that argument. *Garibaldi v. Lucky Food Stores, Inc., supra,* 726 F.2d at 1375-1376; *Peabody Galion v. Dollar, supra,* 666 F.2d at 1321. Explaining why *Alexander v. Gardner-Denver Co., supra,* applies to claims arising under state law, the Ninth Circuit noted:

> The fact that Alexander's additional remedy was one created by *federal* rather than *state* law does not diminish the force of the argument. First, the focus of *Alexander* was the preclusive effect of the arbitration, not the preemptive effect of federal law—a supremacy clause issue. Second, the Supreme Court held in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.* [citation] that a discrimination action under Colorado law was not preempted by the RLA.

Garibaldi v. Lucky Food Stores, Inc., supra, 726 F.2d at 1375 n. 13.

Each of the reasons supporting the *Alexander* and *Barrentine* decisions applies with equal force when the employee's claim is based on state, not federal, law.

Arbitrators are experts in the "law of the shop, not the law of the land." *Barrentine v. Arkansas-Best Freight Sys., supra,* 450 U.S. at 743. Arbitrators may not be conversant with federal law and policy, *ibid.,* and they are even less likely to be familiar with state laws and policy.

Arbitrators are limited to interpreting and enforcing the collective bargaining agreement. *Id.* at 743-744; *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 53. They may be unable to enforce state law. Also, arbitrators are required to effectuate the intent of the employer and union, not the state legislature's intent. Their decisions may, therefore, be inimical to the public policies underlying state statutes. See *Barrentine v. Arkansas-Best Freight Sys., supra,* 450 U.S. at 744; *Peabody Galion v. Dollar, supra,* 666 F.2d at 1322. Arbitration also differs from state law remedies in the evidentiary rules applied and the relief which may be ordered. *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 57-58; *Peabody Galion v. Dollar, supra,* 666 F.2d at 1322-1323; *Messenger v. Volkswagen of America, Inc., supra,* ..... F.Supp. at .....

Of "further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented." *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 58 n. 19. A union may legitimately subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit. *Ibid.; Barrentine v. Arkansas-Best Freight Sys., supra,* 450 U.S. at 742. The union's legitimate concern with the interests

of all bargaining unit employees works at cross purposes with Hawaii Revised Statutes Section 378-32 which guarantees rights to individual workers regardless of the effect on other employees. Requiring arbitration of claims under section 378-32 would in effect give unions a veto power over enforcement of rights the Hawaii legislature has guaranteed each employee. Congress surely never intended such a drastic intrusion on the states' powers to enforce their laws.

The Hawaii Supreme Court correctly applied *Alexander* and *Barrentine,* holding that Puchert need not exhaust his arbitral remedies under the RLA before proceeding in the Hawaii Department of Labor and Industrial Relations on his claim that Pan Am discharged him in violation of Hawaii Revised Statutes Section 378-32.

CONCLUSION

The Hawaii Supreme Court correctly concluded that the RLA does not preempt Hawaii Revised Statutes Section 378-32 and that Puchert may proceed with his state administrative remedy against Pan Am for violation of that section; he need not exhaust arbitral remedies under the RLA.

Pan Am's appeal presents no substantial question of federal law for decision by this Court. This Court has already established the governing principles in *Colorado Anti-Discrimination Comm'n, Farmer* and *Sears,* and in *McKinney, Alexander* and *Barrentine.* The Hawaii Supreme Court correctly applied those principles to the facts of this case. The appeal should be dismissed or summarily affirmed. *Zucht v. King,* 260 U.S. 174, 176 (1922); *Equitable Life Assur. Soc'y v. Brown,* 187 U.S. 308, 311 (1902).

Respectfully submitted,

KURT W. MELCHIOR
SEVERSON, WERSON, BERKE & MELCHIOR
A Professional Corporation
One Embarcadero Center, 25th Floor
San Francisco, CA 94111
Of Counsel

JAN T. CHILTON
One Embarcadero Center, 25th Floor
San Francisco, CA 94111
(415) 398-3344
Attorney for Appellee George Puchert

June 21, 1984

(Supplementary Appendix follows)

SUPPLEMENTARY APPENDIX*

*Puchert has been unable to obtain a copy of the 1977 collective bargaining agreement. Changes made by the 1980 collective bargaining agreement, which is reproduced here, are marked with a capital "T" in the left-hand margin. No such changes were made in the crucial provisions reproduced here or cited in the text.

TABLE OF CONTENTS

ARTICLE	SUBJECT	PAGE
	Preamble	1
1	Purpose of Agreement	2
2	Recognition	2
3	Working Week	2
4	Overtime Compensation	4
5	Emergency Work	6
6	Holidays	7
7	Vacations	8
8	Seniority	11
9	Classifications and Promotions	14
10	Transfers	15
11	Leave of Absence	16
12	Military Leave - Retention of Seniority	17
13	Termination of Employment	17
14	Paid Sick Leave	18
15	General	20
16	Bulletin Boards	22
17	Equal Treatment	22
18	General Benefits	22
19	No Strike - No Lockout	22
20	Management Clause	22
21	Discipline and Discharge	23
22	Adjustment of Grievances	23
23	Board of Adjustment	25
24	Meal Periods	25
25	Absence from Duty	26
26	Foreign Station Assignment	26
27	Physical Examinations	27
28	Missing, Internment, Prisoner or Hostage of War	28
29	Union Shop Agreement	29
30	Severance Allowance	35
31	Bomb Scare/Hijack Coverage	38
32	Mutual Agreement	39
33	Safety	39
34	Duration of Agreement	43

TABLE OF CONTENTS (Cont'd.)

APPENDIX	SUBJECT	PAGE
A	Wage Rates and Administration	45
B	Adjustment Board Agreement	51
C	Meal Allowance	57
D	Line Station Special Increments	58
E	Temporary Assignments - Reimbursements	59
F	Staffing - Line Stations	60
G	Staffing - IAD, BAL, PHL	63
H	Staffing - BOS	64
I	Base Vacancy Preferences	65
J	Temporary Employment - SEA	68
K	Commissary Employees - GUM	69
L	Union Leaves of Absence	71
M	Disciplinary Records	72
N	Free/Reduced Rate Transportation	73
O	Merger Letter	74
P	System Displacement Program	77
Q	Chicago Base	79
R	Training	80
S	Vacation Computation, Union L.O.A.	81
T	Memorandum of Agreement re: Catering	82
U	Dues Deduction	99
V	Side Agreements	100
W	Benefit Booklets	101
X	COPE	102
Y	Legal Service Plan	103

AGREEMENT

between

PAN AMERICAN WORLD AIRWAYS, INC.

and

TRANSPORT WORKERS UNION OF AMERICA, AFL/CIO

Representing

PORT STEWARDS

and

SENIOR PORT STEWARDS

PREAMBLE:

*A-T THIS AGREEMENT is entered into this 21st day of November, 1980 by and between Pan American World Airways, Inc. (hereinafter sometimes referred to as the "Company") and the Transport Workers Union of America, AFL/CIO (hereinafter sometimes referred to as the "Union") as representative of the Port Stewards.

---

* Language of paragraph or article result of:
A — Agreement effective January 1, 1947
B — Agreement effective July 1, 1948
C — Agreement effective September 30, 1949
D — Agreement effective March 26, 1951
E — Agreement effective April 14, 1952
F — Agreement effective March 1, 1953
G — Agreement effective June 8, 1954
H — Agreement effective September 10, 1955
I — Agreement effective October 1, 1957
J — Agreement effective March 4, 1959
K — Agreement dated December 15, 1960
L — Agreement effective October 5, 1962
M — Agreement effective September 10, 1964
N — Agreement effective December 23, 1966
O — Agreement effective April 19, 1969
P — Agreement effective June 4, 1971
Q — Agreement effective August 1, 1973
R — Contract Amendments effective November 1, 1975
S — Agreement effective November 1, 1977
T — Agreement effective July 1, 1980

employee's normal wage, the sick leave credit drawn shall be at such lower rate so as not to permit the employee to receive an amount in excess of his normal wage. Such credit drawn shall be computed to the nearest hour.

C 4. In meritorious cases, the employer, at his discretion, may pay disabled employees full wages or partial wages for such periods as he deems proper over and beyond his obligations referred to above.

Article 15

GENERAL

A (a) Provisions of this Agreement will apply only to the extent that they do not conflict with local laws of any country, state, territory or possession.

A (b) An employee stationed at a foreign station or on a special assignment away from his base station shall be provided with transportation according to Company practice in the event of an emergency involving the employee or his immediate family.

A An employee shall receive prompt written notice confirming orders involving a permanent change in status or compensation or placing him on a special assignment.

A Each employee and his immediate family shall be granted passes subject to the approval of the Company.

A (c) The Company shall prepare copies of this Agreement and shall give a copy to each employee.

B (d) An employee hereunder who, for a day or longer, is assigned by the Company to perform the duties and accept the responsibilities of a higher classification of work, shall be paid not less than the established rate for said classification for the time so worked.

B (e) Before the end of each shift, employees shall be allowed five (5) minutes' wash-up time.

APPENDIX B

B,F PAN AMERICAN WORLD AIRWAYS, INC.

and

TRANSPORT WORKERS UNION OF AMERICA, AFL/CIO
ADJUSTMENT BOARD AGREEMENT

Pan American World Airways, Inc. hereinafter referred to as the Company, and Transport Workers Union of America, AFL/CIO, hereinafter referred to as the Union, hereby agree as follows:

T (a) There are hereby established, pursuant to the provisions of the Railway Labor Act, as amended, the following Adjustment Boards:

System Board
Western Region Field Board
Eastern Region Field Board
Southern Region Field Board

Grievances which may be properly referred to them shall be handled by Adjustment Boards as follows:

1. Field Adjustment Boards will handle Discipline and Discharge grievances, grievances relating to the qualifications of individuals and any grievances referred to the Field Board by the System Adjustment Board for local disposition. However, no Field Board shall have jurisdiction to interpret this Agreement.

2. The System Adjustment Board will handle all other grievances.

(b) Each Board shall be composed of four (4) members; two (2) selected by the Company, and two (2) selected by the Union.

(c) The members of each Board shall continue to serve until such time as the parties selecting the representative members shall select their successors which may be done at any time except during the consideration of a case.

(d) Each Board shall have jurisdiction only over disputes between the Company and the Union or any employee or employees governed by System Agreements growing out of grievances involving interpretation or application of such Agreements. No Board shall have jurisdiction whatsoever over proposals relating to general charges in hours of work, rates of pay, rules or working conditions. Proposals relating to rates of pay, rules or working conditions shall be handled in the manner provided for in the DURATION OF AGREEMENT Sections of the respective Agreements.

(e) Each Board shall meet at the Field or System Headquarters of the Company, as the case may be, in four (4) regular sessions each year during the months of February, May, August, and November, provided that at such times there are any cases filed with or pending before the Board. The Chairman or the Vice Chairman may, if circumstances require, call a special meeting at any other time. The date on which the Boards will meet shall be established by the Chairman and the Vice Chairman. In order to eliminate any possible conflict in meeting dates, the schedule will be coordinated by the Vice President, Labor Relations for the Company and the Director of the Air Transport Division or his designee for the Union.

(f) The members of the respective Boards shall select a Chairman and Vice Chairman whose terms of office shall be one (1) year, provided, however, that the offices of Chairman and Vice Chairman shall be filled alternately by a member representing the Company and a member representing the Union, that is, when a Union member is Chairman, a Company member shall be Vice Chairman, and vice versa.

(g) The Chairman, or in his absence, the Vice Chairman, shall preside at meetings of the Board and shall have a vote on the adoption of all decisions of the Board.

(h) A dispute submitted to the Board shall be in the form of a joint submission agreed to by all parties and shall state:

1. The name of the employee or employees involved if the dispute grows out of grievances of individual employees;

2. A statement that an attempt has been made to obtain an adjustment of the dispute in the manner provided for in applicable System Agreements between the parties and that the parties have failed to reach in such manner a satisfactory adjustment;

3. A statement of the nature of the dispute and the basis for the jurisdiction of the Board of Adjustment;

4. The position or contention of the Union and of the employee or employees; and

5. The position or contention of the Company.

(i) If all parties to the dispute cannot agree on a joint submission, then and only in that event, any party to the dispute may submit the dispute by petition which shall contain all the statements required in a joint submission. In all cases where a dispute is not submitted in the form of a joint submission, the party or parties to the dispute who have not joined in the submission shall be served with a copy of the petition at least fifteen (15) days before the date set for the hearing and shall have the right within such fifteen (15)-day period to file with the Chairman of the Board a written answer thereto.

(j) Seven (7) copies of each submission or petition including all papers and exhibits in connection therewith, shall be delivered to the Chairman or Vice Chairman of the Board, who shall immediately transmit one (1) copy thereof to each member of the Board, one (1) copy to the Company and one (1) copy to the Union. Upon receiving a submission or petition, the Chairman and Vice Chairman shall set a date for hearing which shall be at the time of the next regular meeting of the Board, or if the urgency of the matter requires, then at such earlier time and place as they shall fix. The parties may be heard either in person, by counsel, or by other representatives as they may respectively elect, and the Board shall give reasonable notice of all hearings to all parties involved in any dispute submitted.

(k) The Board may summon any necessary witnesses and relevant non-confidential records of the Company and the employee involved.

(l) A majority vote of all members of the Board shall be competent to make a finding or a decision with respect to any dispute properly submitted to it, and such finding or decision shall be final and binding upon the parties to such dispute.

T (m) Upon failure of the Board to agree upon a finding or decision because of inability to secure a majority vote, the party who submitted the petition under paragraph (h) or (i) of this Article may elect in writing:

1. To immediately appeal or to withdraw the petition; or
2. To utilize a period up to sixty (60) calendar days to decide whether:
   A. To withdraw the petition; or
   B. To appeal the case to a five (5)-member Board.

If the petitioning party decides to appeal the case, it shall be submitted to an impartial person to be known as "Referee" who will sit with the Board as an additional member thereof in the further hearing and determination of the case.

Within five (5) work days after receipt of a written appeal, or the completion of the sixty (60) calendar-day period during which the case has not been withdrawn, the Vice President, Labor Relations or his designee for the Company and designated representative for the International Union shall forthwith proceed to select a "Referee" to sit with the Board. If the parties are unable to agree upon the selection of such additional member within fifteen (15) calendar days, they shall promptly request the National Mediation Board to submit a panel of seven (7) names from which the "Referee" will be selected, and when so named, the parties shall immediately arrange to schedule a date for a hearing to reach a determination of the dispute.

(n) Findings and decisions of the Board shall be stated in writing, and in each case a copy of the findings or decisions shall be furnished the Company, the Union and such employee or employees as are parties to the dispute. If a dispute arises as to the interpretation of the finding or decision, then upon request of the Company, the Union, or such employee or employees as are parties to the dispute, the Board shall interpret the finding or decision in the light of the facts stated as evidence presented in connection with its record and hearing of the case.

(o) The Board shall keep a complete and accurate record of all matters submitted for its consideration and of all findings and decisions made.

(p) All expenses of the Board, including those incurred by reason of the participation of a "Referee" in the determination of the controversy as herein provided, shall be borne one-half (1/2) by the Company and one-half (1/2) by the Union. The salary or compensation of the members of the Board, if any, shall be paid by the parties selecting such member or members; except that Field Board members who are employees of the Company shall be granted necessary leaves of absence without loss of pay to attend Board meetings. So far as space is available, Board members shall receive free transportation, subject to pay load, over the lines of the Company from point of duty to point of meeting and return for the purpose of attending meetings of the Board.

(q) It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner without fear that his individual relations with the Company or with the employees hereunder may be affected in any manner by any action by him in good faith in his capacity as a Board member. The parties hereto further mutually agree that each party shall and will specifically instruct each Board member selected that he shall at all times while serving in that capacity act not as a partisan or advocate of a partisan group or cause but shall act and serve solely to render impartial findings and just decisions.

(r) 1. Essential witnesses and representatives who are employees of the Company shall be furnished space

available transportation over the Company's lines without charge from the point of duty to the point of hearing and return, and such witnesses and representatives shall be granted leaves of absence without pay for a sufficient time to permit them to appear as such witnesses and representatives.

2. Witnesses and representatives who are not employees of the Company, who may be called by either party, shall be given space available transportation over the lines of the Company to the point of hearing and return subject to Governmental regulations.

This Agreement shall become effective as of May 1, 1954 and shall continue in full force and effect until September 1, 1955 and shall renew itself without change until September 1 of each succeeding year thereafter unless written notice of intended change is served by either party hereto in accordance with Section 6, Title 1, of the Railway Labor Act, as amended.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement, this 8th day of June, 1954.

PAN AMERICAN WORLD AIRWAYS, INC.

/s/ Everett M. Goulard
Director, Industrial Relations

TRANSPORT WORKERS UNION OF AMERICA, AFL/CIO

/s/ James F. Horst
International Vice President
Director, Air Transport Division